IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

PETER NELSON AND HENRY NELSON,
Plaintiffs in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Respondents.

BRIEF OF APPELLANTS.

STATEMENT OF FACTS.

The facts in the above-named cause are, for the purpose of this appeal, "stated." They appear in the transcript as the statement of the case, page ——,etc.

To the point involved the facts are: That Henry Nelson, for the purpose of acquiring a homestead under the laws of the United States, duly settled upon the lands in question, being the south-east quarter of section twenty-seven (27), township twenty (20), north of range fourteen (14). This *bona fide* settlement was made by Nelson in 1881. That said Nelson was qualified to make such settlement for the purposes of said anticipated homestead.

That the respondent company filed its map of definite

location—coterminous with the lands—December 8th, 1884.

That the lands (for the purpose of consummating the homestead or settlement) was not surveyed until 1893. The appellant all the meantime being on and continuing in settlement and possession of said land, improving the same as required by the homestead laws.

That immediately after survey, to-wit, in 1893, the appellant duly made application to perfect his entry in the modes required by law. That the said application was then rejected by the local land office on the sole ground that the said application was in conflict with the grant of the Northern Pacific Railway (Art. XII. of facts). That said Peter Nelson is in the occupation of said land in cotenancy and by consent of the said Henry Nelson.

The Railroad Company brought action in the State Superior Court of the State of Washington against appellant in form of ejectment. Defendant (appellant) denied company's title or right to possession.

The company relies upon the exhibition of a patent, to which there was due reply and issue made contesting the said patent for want of jurisdiction and fraud, mistake of fact and of law. The lower court found for and decided with the claim of appellant. The company appealed to the Supreme Court of the State of Washington and the lower court was reversed and the land awarded to the company. This writ of error is prosecuted from the ruling and final judgment of the Supreme Court of the State of Washington.

The question involved is, who has precedence of possession and right of occupancy to the land—the appellant by reason of his settlement and improvements, or the company by reason of its grant and withdrawals?

The facts of the said grant and withdrawal are:

That the company is successor to the N. P. R. R. Co., which had obtained a grant by the Act of 1864, July 2d.

That by third section of the act the alternate sections were granted—including 40 miles on either side of the road line.

That said grant was accepted *with its* conditions.

That a map of general route was filed in Commissioner's office of general land office, August 20, 1873.

That after December 8th, 1884—the date of the fixing of said definite line, to-wit, May 10th, 1895—while appellant was in possession as settler, claiming said land as homestead, the United States was caused to give patent to said land to the N. P. R. R. Co., *with knowledge on the part of the said government and the railroad* of appellant's claim and rights. (No notice to said Nelson of the application by said company for patent having been given.)

BRIEF OF THE LAW.

I.

When a patent is offered to support a claim of title in the courts of the State of Washington it may by the code procedure and law in effect be assailed as a fraud or having no effect for any other reason.

The State of Washington having blended equity and law relief in one action; particularly in ejectment suits. Such is provided by specific statute. They are quiet title and peace statutes, a procedure of economy, a

policy of the state. Such is, therefore, the law for this court.

St. P. & P. R. R. Co., v. *M. P. Ry.*, 139 U. S., 1-19.

Burfenning v. *C., M. & St. P. Ry.*, 163 U. S., 310-320.

Northern Pacific Ry. v. *Colburn*, 164 U. S., 387.

The law of the State of Washington, beginning with the Territorial legislation, is announced as herewith stated in *Burmeister* v. *Howard*, 1 W. T. Rep., 207, saying in effect that the action of ejectment is to try every question going to make or unmake the title claimed.

The statute of the State is Hill's Code, 530 *et seq.*, and the construction of the same by the State Court as follows:

> " The plaintiff in such action shall set forth in his complaint the nature of his estate, claim, or title, to the property, and the defendant may set up a legal or equitable defense to plaintiff's claims, and the superior title, whether legal or equitable, shall prevail.
>
> " *Burmeister* v. *Howard*, 1 W. T., 207. The action is not only to try merely the abstract legal fee to the soil, but to determine who is entitled to the possession, and therefore the holder of the naked fee may not recover, if by his acts, the title be in the adverse party.
>
> " Our statute evidently contemplates that actions for the recovery of real property, but determine the present right of possession, and the verdict, if for the defendant, is that plaintiff is not entitled to possession.
>
> " 2 H. C., 533. The jury by their verdict shall find as follows: . . . 2. If the verdict be for the defendant, that the plaintiff is not entitled to the possession of the property described in the complaint, or to such part thereof as the defendant defends for, and the estate in such property, or part thereof, or license, or right to the possession of either estab-

lished on the trial by the defendant, if any in effect as the same is required to be pleaded.

"A judgment awarding defendant possession of the property in this action, would not be a bar to another action, between the parties affecting the property in dispute, and defendant might bring an action to have the plaintiff declare the holder of the title in trust for defendant, or defendant might move the Attorney General of the United States to begin suit to have the patent issued to plaintiff set aside."

These statutes received the construction herein contended for by the Federal Court sitting in Washington.

Green v. *Tacoma,* 51 Federal, 622-3.

Wherever the code remedies prevail and similar statutes obtain the course herein contended for has been adopted, even in the Federal Courts applying local practice as provided for by the Revised Statutes.

II.

The Land Was Not Withdrawn.

It is contended by the appellant that the land in question was not withdrawn by virtue of the Sixth Section of the Act of 1864, nor by the filing the map of general route, because, as stated in the Act, there was at the time of the designation of the route, "there was land—the same now in question—not free from . . . claims or rights" at the time of the definite location.

The Act does not limit the exemption to a "homestead" or "pre-emption" filing, nor to an accepted claim, but to any land having a *right* to homestead or claim. *We insist that the settling upon in good faith as the necessary condition precedent under the law to filing a homestead created* a claim to homestead; created a right to a filing.

In this connection we are not unmindful of the rulings made by this court, which have been construed as meaning that the "filing" actually by act of the Register, at the instance of the claimant, was necessary to attach a right; also that per dictum that "it is asserted that the offer to pay or the payment of the money required by law was necessary."

Such seems to be the trend of or the construction given on Circuit to:

N. P. R. Co. v. *Coburn,* 164 U. S., 383.
Gonzales v. *French,* 164 U. S., 388.

These have given rise to decisions by Supreme Courts of States and Circuit Courts of United States, sustaining in part the views contended for by defendant in error. *Nevertheless,* and despite these views, we respectfully insist that this court, having in view, more lately pointed out, how inequitable it was to say that a settler could not obtain rights until he filed—knowing that he could not file until survey—and that because the railroad company could between an honest settlement and the opportunity of filing, to wit, the survey by the Government, an act in point of time the settler could not control—that the road could file a map—an act over which the settler could exercise no prohibition, and from these the settler must lose his home, be denied the benefits of the very things the law created as a condition upon which a free home should vest—this court noted that such course would work a fraud and deny, not effect, the very purpose of the law. So this court more lately has declared the meaning of the words in the Act of the N. P. grant, to wit, "claim or right to mean what it says, a *right* to the home; a right by virtue of the honest acts done, to wit, *residence* and *improvement* with honest intent, all done in ignorance of the future to be made claim of the company.

Therefore the more humane and equitable doctrine is the one now obtaining, as announced by this court, to wit:

> "In connection with Section 3 of the Act (1864) which manifestly contemplated that rights of pre-emption or *other claims* or *rights* might accrue or become attached to the land *after the general route was fixed* and before the line of definite location was established."

Railroad Co. v. *Sanders,* 166 U. S., 636.

The Act does not define the right. Therefore in equity it means "a *right* which would be right to recognize and equitable to enforce."

> "The filing of the map of general route gave the Railroad *no claim to any specific lands within the exterior limits of such route* on either side of the road . . . and *title does not attach* to specific sections until they are identified by an *accepted* map of *definite location* of the line of road to be constructed."

Menotti v. *Dillon,* 167 U. S., 720.

N. P. v. *McCormick,* 94 Fed., 936.

Therefore, with an honest settlement for homestead purposes, an honest improvement, preceding the filing of the accepted map of location gave a *preceding right* to the settler. Such, we insist, gave and established a "lawful claim" upon the land in controversy. It was a "right" or claim of right as contradistinguished to claims *attached* (which latter word is not in the section now referred to).

Menotti v. *Dillon,* 167 U. S., 722.

Grubbs v. *U. S.,* 105 Fed., 314.

III.

Now, let it be borne in mind that the only act of the government by Congress in favor of the company was anterior to the settling upon the land by the appellant. That the *only conduct* which gave the company the benefit of the act was done *subsequent* to appellant's entry upon the land as a settler. We insist, therefore, that no declaration or promulgation by the department officer could affect these rights of the settler theretofore attaching to him. Particularly where the granting act of Congress reserved no such power or privilege in such administrative officer.

Northern Pacific R. R. v. *Smith*, 171 U. S., 269.
N. P. v. *Sanders*, 166 U. S., 636.
(See authorities cited under point IV.)

Conceding for argument that in construction of acts using the word "attached" referring to homestead, preemption or other rights, this court meant generally to say an actual filing, referring to the definition of the word *"attached"* as given by Mr. Justice Miller in *Dunneyer* v. *Road*, 113 U. S., 629, reading:

> " Section 4 of Act 1864 (Kans., etc. Act). Every alternate section, etc. . . . to which a preemption or homestead claim may not have *'attached'* at the time the line of the road is definitely located." (Quotation from Dunneyer case, page 630.)

Same situation in Central Pacific granting acts.
Also those relating to Minnesota lands.

Yet we must not overlook the duty to construe the words of these acts in the most limited manner possible so as to give the settler the greatest opportunity to enjoy the object and purpose of the acts. *Tarpey* v. *Madsen*, 178

U. S., 219. So no word can be construed into the act when apparently purposely omitted. *Sioux City, etc., R. R.* v. *U. S.*, 159 U. S., 349. The word "attached" as used in the early Minnesota and Union Pacific, Kansas and Iowa and Nebraska grants had been construed to mean as the court say—a *filing*—an act that attached by the *thing* the land to the claimant. This construction though true to the word "attached" was apparently false to the fair purpose of its intended meaning. So in the later act 1864 of the N. P., in section three the word "attached" *as theretofore used is omitted. It is not necessary under that section that the right or claim to the land should have "attached."* It is only required to have existed, though wholly unattached. So the words of the opinion in *Colburn* v. *N. P.*, 164 U. S., 389, can have no application to an act or section omitting the word "attached."

The words of section three of the Act of 1864 are:

> "*Free* from . . . any claim (claims) or rights at the time the line of the road is definitely located." (See Sec. 3, Act Cong., 1864.)

This exceptive manner of statement differing from the acts using the words rights or claims "attached" is meaningful and is sufficient to establish that the words "free from . . . claims or rights" mean free from any *claim of right or right of claim* to the land.

Nor. Pac. R. R. v. *Musser Sauntry*, 168 U. S., 608-609.

This latter construction as given by this court is a practical departure upon reason from previous views to the contrary. It is time and the gradual unfolding to the sense of justice the purport of these granting acts measured by the duty of the government to the settler and his rights which has constrained the honest conscience of

courts to change views, heretofore expressed. Note the words of the late Justice Field in *Barden* v. *N. P.*, 145 U. S., p. 543, saying:

> " Three justices, of whom the writer of this opinion was one, dissented from the majority of the court in the Leavenworth case; . . . and this writer, after a much larger experience in the consideration of public land grants since that time, now readily concedes that the rule of construction adopted, that in the absence of any express provision indicating otherwise (to illustrate, the word "attached"—parentheses by brief writer) a grant of public lands *only applied to lands which are* FREE *from existing claims* is better and safer, both to the government and to private parties."
>
> *N. P.* v. *McCormick*, 94 Fed., 938-9.

The settlers' rights by the Act of Congress, May 14, 1880, relate back to time of his settlement. 21 Statutes at Large, page 140.

Says Mr. Justice Peckham for the court in *N. P. Ry. Co.* v. *Lacey*, 172 U. S., page 635:

> " We would say that if there were at the time of the filing of the map of definite location an *actual existing claim, even though it might turn out to be wholly unfounded, the land thus claimed would not pass by the grant.*"

IV.

THE ORDER OF WITHDRAWAL OF NOVEMBER 1, 1893.

If it be contended that the order of withdrawal of November 1, 1893, operated to segregate the land in question, let it be answered by the words of the order and its legal weight.

First. No order made by the Commissioner could be effective indiscriminately holding up land anywhere from

entry. The law is that the land attaching to the N. P. could only so happen when definite map of location had been filed and ACCEPTED.

S. P. R. R. v. *U. S.* (C. C. A.), 109 Fed., 921.
U. S. v. *O. & C. Ry.*, 176 U. S., 28, 43, 46.

The mere filing general route only indicated for the company's purpose the line through and to which it would ultimately file its map, taking along such route now suggested such land which may be *free* from claim at the time of the filing of the map of definite location.

N. P. Ry. Co. v. *Musser-Launtry Co.*, 168 U. S., 608, 609.
Menotti v. *Dillon*, 167 U. S., 720.
N. P. Ry. Co. v. *McCormick*, 94 Fed., 939.

This court has inclined to treat such order as of no value or most limited in its effect, being contrary to the purpose of the law and inconsistent with the spirit of the granting acts.

Hewett v. *Schultze*, 180 U. S., 139, etc.
Powers v. *Slaght*, 180 U. S., 173.
So. P. Ry. v. *Bell*, 183 U. S., 675.

V.

If it be contended that the action of the Land Department in granting patent to company, without notice to claimant, the Government and the company, having knowledge of claimant's entry and possession by the proceeding of contest of date, 93 and 94 (referred to in par. XII of stated facts), is final, and cannot in its error of fact and error of law be assailed in a proceeding properly lodged in the tribunal where the matter of error by the

law of the forum is triable. We answer that such contention is opposed to the settled rulings on the point.

Whitney v. *Taylor,* 158 U. S., 85, etc.
N. P. v. *Colburn,* 164 U. S., 286.
Menotti v. *Dillon,* 167 U. S., 719.
United States v. *N. P. Ry.,* 95 Fed., 864.

VI.

Tendering of Money. Filing Fee.

It is urged as further matter in support of title by the company and in opposition to appellant's claim that the record does not show the tendering of the money for filing, the Government price. We deny this contention.

First. We contend that such was not necessary in the absence of the word "attached." See *infra.*

That the words attached contemplated an active filing and of course money was to be paid, or tendered, if one rested upon rights through a *filed claim,* or by reason of one which needed to be filed to be substantial or preferred. We insist that where the "rights" or "claims" are any part of an equitable cognizance, the rule as to payment which can apply to but one *state of claim,* pre-emption or homestead filing, has no application.

See authorities cited *infra.*

Record Shows Money Must Have Been Tendered.

Second. However, admitting, for the sake of argument, that the matter of the tendering of the filing fees or government price is relevant here, the record nowhere shows the *absence of such.* The record, Statement of Facts, par. XII, shows and concludes the fact, that the claimant after occupying the land from 1881, in 1893 "attempted to enter the same under the homestead laws."

That his proffered filing was rejected *because said application conflicted with the grant of the road.* It is the common-sense law that all matters which in contemplated legal form are presumed to precede a judicial or quasi judicial determination did so precede. So the attempt to enter under the homestead laws can only be made in full meaning of the phrase by tendering the legal amount and offering the filing. This is the definition of attempting to enter under the homestead law following settlement.

Therefore the evidence naturally and legally deducible from the *only thing* before the court and logical and natural to indulge, is that the money was tendered.

Smith v. *U. S.*, 170 U. S., 377-378.

The *proof* is that the record shows that the "attempt to enter was denied and application rejected because" the same conflicted with the grant of the Northern Pacific Road. If the money had not been tendered the rejection would have been on that ground.

The giving the one reason assumed that all things necessary to reach that far, to wit, to the precedence of grants or filings, had been done.

Where one deed is offered as title and rejected because subsequent to another deed in point of sovereignty, such assumes two deeds. To have a contending deed, calling for ruling upon superiority of rank, the elements making a *deed* are accorded the instrument, to wit, consideration passed, and delivery. So the filing of the claimant is, on the record, shown to have been accompanied by all the law assumes to have existed before the conclusion of rank of filings could be adjudged by the tribunal having such to do.

M., K. & T. Ry. v. *Cook,* 163 U. S., 491.
Carr v. *Fife,* 156 U. S., 495.
Barden v. *N. P.,* 154 U. S., 1138.

THE LAND UNSURVEYED.

But keep in view the land at the time of settlement was unsurveyed; no filing could be made. When surveyed the filing was held to be impossible because of the intermediate filing of company's map. So the question of fees is irrelevant and immaterial.

N. P. R. R. Co. v. *McCormick,* 94 U. S., 941.

COMPANY ESTOPPED. NOT QUALIFIED TO RAISE QUESTION OF NON-PAYMENT.

Conceding the matter of fees to be paid government, the part consideration for the land, relevant and material, *it is only so to those who would have a right* to collect the same, the government.

Smith v. *U. S.,* 170 U. S., 377-378.

The matter of actual going in and upon the land by the settler goes to the question of the right of possession; opens the question of right to claim the same. The matter of paying the money due, being a part consideration, the co-operative with settlement and improvement, this goes to the question of perfection of possession, or title absolute. This can only be a matter for the grantor, the person to whom the money is owing—to whom it is due.

Van Wyck v. *Knevals,* 106 U. S., 360.

Is it not Hornbook law to every country lawyer defending ejectment suits, that a grantee in a subsequent deed can not claim over a superior deed because the grantee in the superior deed has not paid the consideration to his grantor? This is an independent debt, may be waived by the grantor, forfeited or lapsed. It is no concern of the second holder of a deed. The second holder does not have the equities of the original grantor, nor can

he dare assert anything under him without bringing him into court to assent thereto.

The government could refuse Peterson a patent for not having paid his consideration, but so long as it was silent, the contending claimant resting only on claim of prior legal possession can not urge such default of payment. It was no duty owed or broken to him (it), the company.

U. S. v. *N. P. Ry.*, 95 Fed., 864.

Grinnell v. *Railroad*, 103 U. S., 739.

The other familiar illustration is before us: A buys land, agrees that before entering he will pay the taxes or a mortgage. A enters, does not pay either. B gets a deed, claims the land. B can not claim any advantage because A did not pay the taxes or the mortgage. This concerns only the State, which may relinquish, or the mortgagee, which may abandon or extend. So, too, could the government waive the payment or default.

U. S. v. *N. P. Ry. Co.*, 95 Fed., 864.

These are conditions running with the full enjoyment of title as against the grantor, not conditions defeating the entry upon the possession and the perfection of the title.

Smith v. *U. S.*, 170 U. S. (cited.)

Says this court, referring to similar contention as made by respondent herein:

> ". . . a private property owner was no party to the contract between the State and the Federal Government, and stood in no position to take advantage of a default of the State, in respect to its contract. His rights were entirely subsidiary to those of the government and if the latter chose to acquiesce in the abandonment of the canals he had no right to complain."

Walsh v. *Columbus etc. Ry.*, 176 U. S., 469, etc.

VII.

If it be contended that by a remedial Act of Congress of January 1st, 1898, the Northern Pacific Railway succeeded to the rights of the N. P R. R.. then we are brought to the sole question, what were the "rights"' of the N. P. R. R. at that date (January 1st, 1898) to be conferred on the N. P. Ry., so far as the present contention is involved.

The decisions of this court, which this court will recognize judicially, show that in 1895 the N. P. R. R. passed into insolvency. It became lifeless. It ceased its existence by a sale under receiver. At that date the N. P. R. R. had no further capacity to carry out initiated proceedings whether in land office or elsewhere to obtain title depending on continuous performance under its grant. Therefore at the N. P. R. R.'s death there ceased to conflict with Nelson's claim any contending proceeding. The grantee in the Congressional grant was dead and no (heirs) successors had been by the Act anticipated as a result of such death. This left the Nelsons the only occupant of or claimant against the government for the land.

The Northern Pacific Railroad's "rights" were in this land *nil.* These rights granted referred only to such as were not lost by the conditions existing or lapsed by the situation. The "rights" of the N. P. Ry. refer to future acquirable ones, *not the power to resuscitate dead ones* or supplant enuring ones to make place for intruding ones. The N. P. P. Ry. Co. therefore got no rights under the act from the N. P. R. R. The N. P. R. R. had none to this land at the date of the remedial or granting act in controversy. By the death of the company the land *unearned* lapsed to the Government save so far as claimed

by a settler. That the Government could give the land to the N. P. Ry. is admitted—though questionable—by the Act of 1898, but not as against a settler's claim quieted by the death of a contestant against a common grantor. See:

24 Statutes at Large, 556.

29 Statutes at Large, 42.

U. S. v. *Flint Ry., etc.*, 95 Fed., 551.

The purchasers at the receiver's sale took only what could be given by decree, the tangible legal assets, and the equitable ones only so far as such purchaser could "take." No such purchaser at receiver's sale was constituted by the Act of 1864 as the successors of the N. P. R. R. The word successors in the Act means its *congressionally created successors.*

U. S. v. *Flint, etc., R. R. Co.*, 95 Fed., 551 and 558-9.

EXEMPTION AND CONFIRMATION TO APPELLANT BY ACT 1887 TO ADJUST LAND GRANTS.

By Section 5 of said Act it is provided that land "sold" is protected; then follows that all land shall be exempted from the section which is under honest claim or *bona fide occupation* of adverse claimants for . . . or homestead.

This section construed with the purpose of the law confirmed to the roads free all land not sold, or which then were not in *bona fide* occupation for . . . homestead purposes. The latter is taken from claim of the roads and transferred to occupant by the Act, if occupant was such before 1882. See:

Act March 3rd, 1889, 24 Stat., 557.

U. S. v. *Holmes,* 105 Fed., 46-7-8.

Manley v. *Low,* 110 Fed., 245, 247 (where claimant was in possession as homesteader).

ACT OF CONGRESS, 1898 (JANUARY 1ST), GAVE LANDS TO CLAIMANT (APPELLANT).

The Act of 1898 under which respondent claims "rights" to land claimed by N. P. R. R. for the purpose of settling disputes at that date and protecting settlers, by fair construction grants the said land in controversy to the claimant. The company accepted the Act, therefore its provisions and effect. The Act recompenses company for any land claimed by settler and not voluntarily abandoned to company by allowing it lands in lieu of such. (See Act.) Now the company is remitted under the Act to lien lands in place of these claimed by claimant. The land by the Act is confirmed to claimant.

30 Statutes at Large, 620, c. 546.

Humbird v. *Avery,* 110 Fed., 466 (saying):

By that act . . .

> "As to those purchasers or *settlers* who elect to retain their claimed lands, the railroad *grantee* or its *successors* . . . may take lien lands therefor and the relinquished lands *revert* to the U. S. and stand as if never included in the grant, and the controversies about them are ended."

The effect of this Act does not depend on any conduct of the land office.

Humbird v. *Avery,* 116 Fed., 468-9.

The settlement, possession and improvement by the claimant was the existence of and the assertion of a "valid claim" (*Thallman* v. *Thomas* (C. C. A.), 111 Fed., 277; *Tarpey* v. *Madsey,* 178 U. S., 219), holding, in effect, that the failure of the Government to survey or do other

things to give opportunity to file cannot be concluded against the settler and his rights thereby affected—if he is an honest settler in good faith.

We respectfully insist that appellant is entitled to the land; that the judgment of the Supreme Court of the State of Washington is erroneous; that same ought be reversed, and order made by this court directing decree in favor of appellant with proper costs and other relief.

Respectfully submitted,

JAS. HAMILTON LEWIS,
Attorney for Appellants.

C. H. ALDRICH,
THOS. B. HARDIN and
RALPH KAUFMAN,
Of Counsel.